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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	CASE NO. CR 20-249 RS (LB)
)	
Plaintiff,)	UNITED STATES' EX PARTE APPLICATION
)	AND [PROPOSED] ORDER RE: PRODUCTION
v.)	OF CELL PHONE COMMUNICATIONS
)	
MARCUS ANDRADE,)	
)	
Defendant.)	
)	

The United States of America, by and through undersigned counsel, hereby respectfully applies for an Ex Parte Order directing that the United States need not produce to counsel for Defendant Andrade approximately 31 communications between Jack and Robert Abramoff seized from Jack Abramoff's cell phone because such communications are irrelevant to the defense under Fed. R. Crim. P. 16 and do not implicate *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150, 154 (1972). The 31 communications are filed under seal, attached here as Exhibit 1, and submitted for the Court's in camera review.

Legal Standard

Rule 16(a)(1)(E) requires the government to make discovery available to the defense if such

discovery is “material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E). “Materiality is a low threshold.... The test is not whether the discovery is admissible at trial, but whether the discovery may assist a defendant in formulating a defense, including leading to admissible evidence.” Discovery Order, *United States v. Andrade*, Dkt. 165, at 4 (internal quotations omitted) (quoting *United States v. Soto-Zuninga*, 837 F.3d 992, 100203 (9th Cir. 2016)).

Brady v. Maryland and *Giglio v. United States* require the government to make available to the defense evidence that is “favorable to the accused” “where the evidence is material to either guilt or punishment.” *Id.* at 3 (internal quotations omitted) (citing *Brady*, 373 U.S. at 87, and *Giglio*, 405 U.S. at 154). “Favorable evidence includes information that would be advantageous or would tend to call the government’s case into doubt.” *Id.* (internal citations and quotations omitted). “*Brady* also requires disclosure of evidence that could be used to impeach the government witnesses, especially where the witness’s testimony is an important part of the government’s case.” *Id.* (internal citations and quotations omitted).

Nonetheless, defendants are not entitled to discovery that is immaterial and irrelevant to their defense. To obtain discovery under Rule 16, a defendant must make a prima facie showing of materiality. *United States v. Little*, 753 F.2d 1420, 1445 (9th Cir. 1984); *see also United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984) (same). “Materiality is a necessary prerequisite to discovery.” *United States v. USDC, Cent. Dist. Of Cal., Los Angeles, CA*, 717 F.2d 478, 480 (9th Cir. 1983). Evidence is material under Rule 16 if it is “relevant to the development of a possible defense.” *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990) (internal quotation omitted).

It is well-established that the government may seek guidance from the Court to resolve discovery disputes. Federal Criminal Procedure Rule 16(d)(1) gives the Court ample discretion to issue protective or modifying orders denying, restricting, or deferring discovery when a party shows that such an order is appropriate.

Argument

Defendant Andrade is not entitled to 31 purely personal communications between brothers Jack and Robert Abramoff that were seized from Jack Abramoff’s cell phone. The government previously reviewed these 31 communications and informed counsel for Defendant Andrade that the

1 communications involved purely personal matters not implicating Rule 16, *Brady*, or *Giglio*. Defendant
2 Andrade nonetheless demanded their production. The government has already produced a Cellebrite
3 image containing non-privileged items on Jack Abramoff's cell phone and recently produced
4 communications between Jack and Robert Abramoff except for these 31 purely personal
5 communications. Because the defense demands production of what the government believes to be
6 irrelevant and purely personal communications that impinge personal and private health-related matters,
7 the government submits the 31 communications for the Court's in camera review and seeks an Order
8 from the Court permitting the government to withhold from production the 31 communications because
9 they are irrelevant under Fed. R. Crim. P. 16, *Brady v. Maryland*, and *Giglio v. United States*.

10 Conclusion

11 The United States hereby files for the Court's in camera review 31 communications (Exhibit 1)
12 seized from Jack Abramoff's cell phone. The United States seeks an Order from the Court that the
13 government is not required under Fed. R. Crim. P. 16, *Brady v. Maryland*, or *Giglio v. United States* to
14 disclose the 31 communications contained in Exhibit 1 to defendant Andrade.

15
16 DATED: May 31, 2023

Respectfully submitted,

17 ISMAIL J. RAMSEY
18 United States Attorney

19 _____/s/_____
20 ANDREW F. DAWSON
21 ROSS WEINGARTEN
22 CHRISTIAAN HIGHSMITH
23 Assistant United States Attorneys
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[PROPOSED] ORDER

Upon the submission of the United States and for good cause appearing, IT IS HEREBY ORDERED THAT the 31 communications between Jack and Robert Abramoff submitted by the government for the Court's in camera review (Exhibit 1) are not disclosable at this time to Defendant Andrade under Fed. R. Crim. P. 16, *Brady v. Maryland*, or *Giglio v. United States*.

DATE: _____

HON. LAUREL BEELER
United States Magistrate Judge